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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 781

DUO-BED CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A18-A19) is reported at 337 F. 2d 850. The Board's decision and order (R. 7-18, 21-22; Pet. A1-A17)[1] are reported at 145 NLRB No. 144.

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[1] "R." refers to the Transcript of Record in the court below.

JURISDICTION

The decree of the court of appeals was entered on November 25, 1964 (Pet. A20). The petition for a writ of certiorari was filed on December 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer violated Section 8(a)(1) of the National Labor Relations Act by discharging an employee for circulating, on behalf of herself and her fellow employees, a petition for a wage increase.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix *infra*, pp. 11-12.

STATEMENT

In February and March 1963, Betty Dickerson, an employee in the sewing department of petitioner company, discussed the subject of a wage increase with a number of her co-workers. She also spoke several times to her supervisor, Frank Minter, about the possibility of a merit raise for the girls in the department (R. 8; 30-32).

On the morning of April 2, 1963, Dickerson discussed a wage increase with employees Peterson and

Alvarez. She suggested that the girls "get together and draw up a petition and send it into the office" (R. 9; 55). Peterson and Alvarez were unwilling, but Dickerson nevertheless printed the following statement on a piece of paper (R. 9; 24-25, 41, 101):

> "We the women of the Sewing Dept. hereby petition management for a 10¢ per hour raise that is long over due."

Below this statement she drew a large irregular seven-sided figure, so that the employees could sign their names without revealing the order in which they signed. The petition also listed a number of reasons for granting the pay increase. These included the increase in the cost of living, the 1½ year lapse since the last merit increase was given, and the loyalty of the employees in standing by the Company during the previous year, when it had experienced financial difficulties (R. 9, n. 1; 101). During the morning break, Dickerson began circulating the petition, which was signed by five employees, about one-half of the number working in the sewing department (R. 9; 29-31, 41, 58-59).

Later that day, employees Roach and Reid, who had signed the petition, heard that the petition had been discussed with Mabel Morris, an employee regarded by them as being unduly sympathetic to management. Roach and Reid requested Dickerson to tear up the petition, stating that "Mabel had found out about it and we'd be in trouble if she tells the front office" (R. 54-55). Dickerson did as she was requested, retaining the torn pieces of paper. As she tore up the petition,

Dickerson told the girls that she would rewrite it in more tactful terms and address it "to both management and Frank Minter" (R. 9-10; 27-29, 32-33).

The same day, Peterson and Alvarez, who had not signed the petition, told Supervisor Minter that it was being circulated in the department. Peterson told him, "Frank you know everyone wants a raise. We have been here a long time, and if anybody gets one, we feel we deserve one" (R. 71). Minter replied, "We'll see what we can do about it" (*ibid.*). During the conversation, Minter asked Peterson if she would tell him who wrote the petition. She refused (R. 10; 70-71).

Thereafter, Minter asked employee Dorothy Cohorn if she "knew anything about the petition that was being circulated, if [she] had seen it" (R. 78). When Cohorn answered that she had seen it, Minter asked if she had signed it. Cohorn answered that she had not signed the petition. Minter stated, "Well, Dorothy, you know this is no way to get a raise" (R. 10; 78). He asked her if she knew who was circulating the petition, and she replied negatively (R. 78).

That evening, Dickerson typed out a second petition, addressed to "Frank Minter and Management," which requested a ten-cent hourly raise (R. 10; 29-30, 104-105). On the following day, April 3, Dickerson brought the petition to the plant and discussed it with most of the employees in the department, both individually and in small groups (R. 10; 31-32). On the same day, Dickerson spoke to Minter at his desk, requesting him to recommend a merit increase for the

department. Minter replied that "he would not turn in a raise because it wouldn't do any good at this time" (R. 9; 30-31).

The next morning, April 4, Dickerson, while conversing with another foreman, Art Rogers, commented about Minter's refusal to turn in a raise for the girls in the department. Rogers replied that "he got a raise for his men anytime he wanted one and he had been getting them" (R. 10; 36). Shortly thereafter, Dickerson again asked Minter if he would turn in a raise for the girls in the department (R. 11; 35). When Minter declared that no raises were being given in the plant, Dickerson replied, "Well, either there are or some of the foremen around here are the biggest liars that ever lived" (R. 11; 36). Minter said, "Maybe so. If I could show you the records I could prove it" (R. 11; 36). Dickerson answered that she would "shut [her] mouth" if Minter could prove it, but the foreman rejoined, "It's too late for that, it's gone too far" (R. 11; 36-37). Dickerson pointed out that the employees had stood by the Company when it had been in financial difficulty the preceding year and declared that, now that it was back on its feet, the Company should give the employees the merit raises it had previously withheld (R. 11; 37). Minter replied, "A dollar forty is better than nothing isn't it?",[2] and then asked, "If you feel the Company has done you dirty, why don't you quit?" (R. 11; 37). Dickerson answered, "I am not about to quit," adding

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[2] Dickerson's wages at that time were $1.40 per hour (R. 37).

that Minter could fire her but that was the only way he could get rid of her (R. 11; 37). Minter ended the conversation with, "Well, if that is the way you feel about it, you leave me no choice" (R. 11; 87). Although Dickerson became angry at Minter, she did not raise her voice at any point during the conversation (R. 11; 44, 47-48, 66).

About five minutes later, Minter returned to Dickerson and told her that she should go to the personnel office to pick up her final paycheck (R. 11; 38).[3] As she was gathering up her belongings, Dickerson noticed the second petition, which she had brought to the plant the previous day. She handed it to Minter, saying, "Here is what you paid your pet rat to tell you about" (R. 11; 38). Minter said, "I don't know what you are talking about" (R. 38). Dickerson stated, "If you want me to name her, it's Mable Morris" (R. 38). Minter replied, "Why, now she didn't tell me, it was a process of elimination. I suspected you but didn't know until this moment for sure" (R. 11; 38). After reading the petition, Minter stated, "I hope you know there is no hard feeling, nothing personal in it" (R. 38).

Later the same day, employee Mary Petersen asked Minter, "Frank, how did you know Betty had the petition?" (R. 12; 73). Minter answered, "I didn't until she gave it to me" (*ibid.*). During this conversation, Minter also declared that it was "against company policies" to circulate a petition (R. 12; 74).

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[3] Minter gave Dickerson no explanation for her discharge (R. 38).

Sometime after Dickerson's discharge, employee Madeline Robinson asked Minter "how he knew that Betty was the one that had the petition." Minter replied, "I didn't know until she gave it to me. I just put two and two together" (R. 12; 82).

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, found that the Company discharged Dickerson because it believed that she had circulated a petition for a wage increase, of which it disapproved. The Board held that, by this action and by interrogating employees Petersen and Cohorn about the petition, the Company interfered with employee rights in violation of Section 8(a)(1) of the Act. (Pet. A2, A14.) The Board ordered the Company to cease and desist from the unfair labor practices found, to reinstate Betty Dickerson with backpay, and to post an appropriate notice (Pet. A15-A16).

The court of appeals affirmed the Board's findings as adequately supported by the record and enforced the Board's order (Pet. A18-A19).

ARGUMENT

Dickerson's action in attempting to obtain a pay increase for the employees was concerted activity for "mutual aid or protection" within the meaning of Section 7 of the Act. *Salt River Valley Water Users' Assn.* v. *National Labor Relations Board*, 206 F. 2d 325, 328-329 (C.A. 9); *National Labor Relations Board* v. *Smith Victory Corp.*, 190 F. 2d 56, 57 (C.A. 2); *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 501-502 (C.A. 5), remanded

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on other grounds, 340 U.S. 361; *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 299 F. 2d 114, 115, 116 (C.A. D.C.); *Walls Mfg. Co.* v. *National Labor Relations Board*, 321 F. 2d 753, 754 (C.A. D.C.), certiorari denied, 375 U.S. 923. Petitioner argues, however (Pet. 12-15), that the "only reasonable inference to be drawn" from the record is that Dickerson was discharged for insulting her foreman and not for circulating a petition for a wage increase. An evidentiary issue of this kind, turning as it does only on the circumstances of this particular case, plainly does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, as noted by the court of appeals (Pet. A19), "the evidence is susceptible of the inference that [Dickerson] was discharged for her activity in regard to the petition." The facts summarized above (pp. 4-7) show that Supervisor Minter suspected that Dickerson was circulating a petition, that he disapproved of concerted attempts by employees to obtain raises and that he discharged Dickerson without warning or explanation. In these circumstances, the Board was fully justified in finding that Dickerson would not have been discharged but for Minter's belief that she was the employee responsible for circulating the petition.[4]

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[4] Although petitioner now asserts that Minter discharged Dickerson because she was disrespectful to him, Minter, who alone made the decision to discharge Dickerson, testified at the Board hearing that he fired her because "she asked me to" (Pet. A10-A11).

Since Dickerson was discharged for her protected activity in circulating a petition for a wage increase and not because "she was a dissident and annoying employee" (Pet. A19), petitioner's argument based on Section 10(c) of the Act (Pet. 6-12) is wide of the mark. That Section prohibits the Board from directing reinstatement of or the payment of back pay to an employee who was "discharged for cause." It applies, however, only where misconduct is in fact the motive for a discharge; it is not applicable where, as here, the discharge was motivated by unlawful considerations. *Fibreboard Paper Products* v. *National Labor Relations Board*, No. 14, this Term, decided December 14, 1964; *National Labor Relations Board* v. *Eastern Massachusetts Street Railway*, 235 F. 2d 700, 709 (C.A. 1), certiorari denied, 352 U.S. 951; *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C.A. 4); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1965.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the pay-

ment to him of any back pay, if such individual was suspended or discharged for cause. * * *

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